CITY OF
ISSAQUAH
WASHINGTON

Mayor's Office

130 E. Sunset Way I P.O. Box 1307
Issaquah, WA 98027
(425) 837-3020
issaquahwa.gov

On behalf of the City of Issaquah, Washington, we submit these comments in opposition to the Federal Communications Commission's ("Commission's") Second Further Notice of Proposed Rulemaking ("NPRM") regarding cable-related, in-kind contributions.

For the reasons outlined below, we respectfully argue that the NPRM should not be adopted.

1. **In-kind contributions are negotiated, they are not assessments nor imposed by the city.**

Cities and cable operators have negotiated in-kind contributions for decades. The parties use this practice as a platform for negotiating specific accommodations for rights-of-way and other considerations that can only be accounted for on a case-by-case basis. The Commission tentatively concludes however, that all negotiated, in-kind contributions except for Public, Educational, and Governmental ("PEG") capital costs incurred in or associated with construction of PEG access facilities should be treated as franchise fees subject to the 5% franchise fee cap.[1] The problem with this conclusion is that in-kind contributions are negotiated; they are not imposed or assessed.

A franchise fee is "any tax, fee, or *assessment* of any kind *imposed* by a franchising authority."[2] Unless defined in the statute, words are given their ordinary meaning.[3] "Imposed" is defined as "established as if by force."[4] This definition does not include or imply terms that have been negotiated between parties. In-kind contributions are negotiated between cable franchisees and the city and are not established by force. Since in-kind contributions are not imposed by the city, they should not be considered part of the franchise fee.

Franchise fees are limited to taxes, fees or assessments. In-kind contributions are obviously not a tax or a fee, they are also not assessments. Since the statute does not define "assessment", we look again to the dictionary definition which defines "assessment" as "an amount that a person is officially required to pay especially as a tax."[5] The only reasonable interpretation of assessment in the context of § 542(g)(1) is that assessment means a monetary obligation that is officially required by the city (i.e. in city code) and

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[1] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, FCC 18-131, at ¶ 20 (Sept. 25, 2018) ("*NPRM*").
[2] 47 U.S.C §542(g).
[3] *FCC v. AT&T Inc.*, 562 U.S. 397, 397 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning")
[4] *Merriam-Webster Online Dictionary*, www.merriam-webster.com/dictionary/impose (last visited Oct. 24, 2018)
[5] *Merriam-Webster Online Dictionary*, www.merriam-webster.com/dictionary/assessment (last visited Oct. 31, 2018).

imposed on a cable operator by the city. However, in-kind considerations are negotiated, not governmentally imposed and, therefore, they should not be considered a component of franchise fees.

Moreover, not only does the text of the statute not support the FCC's conclusions, the conclusions would also reduce the bargained-for consideration that the parties have historically used and as such, should be considered an unlawful impairment on the parties' right to contract. Any retroactive application of this proposed rule will impair the negotiated terms that both parties have mutually agreed upon. Accordingly, the FCC should reject the inclusion of in-kind contributions as franchise fees.

2. Statutory interpretation requires that statutes be harmonized.

47 U.S.C. § 531(b) and § 541(b)(3)(D) authorize cities to require cable operators to designate channel capacity for PEG use and for I-Nets. However, the statute's intent is sidelined unless cities have a method for exercising this authority. Historically, cities negotiated channel capacity for PEG uses within the franchise. Neither the cable operators nor cities ever considered the designations of channel capacity as an in-kind contribution. Rather, it is the fulfilment of the statutory authorization.

The franchise is the only mechanism that cities can use to require cable operators to provide channel capacity. The Commission's tentative conclusions will force cities to choose between receiving cable franchise fee revenues, which are allocated to general city operations, and continuing vital community services, such as PEG operations.

Furthermore, the Commission's interpretation of franchise fees as including in-kind contributions creates a contradiction within the statute because it renders moot the cities' authority under § 541(b)(3)(D). The statutes must be harmonized to effectuate the purpose of each provision.[6] The FCC's tentative conclusion to include PEG Channel capacity as an in-kind contribution which may be offset against franchise fees does not permit effectuation of §531(b) and §541(b)(3)(D). This proposal is in direct conflict with caselaw and the canons of statutory interpretation.

3. In-kind contributions benefit the entire community, not just the city.

Categorizing in-kind contributions as franchise fees ignores the meaningful impact these in-kind contributions provide to the community at large, not just the city government. Schools, libraries, community centers and fire departments all benefit from the complimentary cable services. In-kind benefits may also include low-income discounts on basic cable services. These services do not provide a monetary benefit to the City, and therefore they are not a "tax, fee or assessment." They also offer a benefit to cable operators, who can use these in-kind services as positive public relations.

Further, if such in-kind services are considered a component of franchise fees, which could then reduce the amount of franchise fees the city receives, then cities in Washington may have to forgo altogether these complimentary services as they could be considered a gift of public funds. As proposed, the FCC would deprive citizens of these beneficial services by including them within the definition of franchise fees.

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[6] *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569 (1995).

4. Conclusion.

The City of Issaquah appreciates the Commission's efforts in engaging local governments on this issue. However, the ability of local governments to regulate the services, facilities, and equipment used by cable operators in the provision of non-cable services intended to serve the entire community is important. We oppose this NPRM because it puts crucial public services at risk by forcing cities to choose between providing needed services and funding general city operations.

We strongly encourage the Commission to reject the tentative conclusions in the NPRM that conclude that cable-related in-kind contributions should be included in the definition of franchise fees.

Respectfully submitted,

Mary Lou Pauly 11.14.18

Mary Lou Pauly,
Mayor, City of Issaquah